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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6340

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED

1. Whether Section 4 of the Judiciary Law of the State of New York, construed by the New York Courts to bestow unfettered discretion upon trial judges to close portions of criminal trials over the objections of defense counsel, is violative of the Sixth, First, and Fourteenth Amendments of the United States Constitution.

2. Whether Section 4 of the Judiciary Law of the State of New York, as applied to the facts of this case wherein the public, including the petitioner's mother, was excluded in the absence of any claim, demonstration or finding of necessity, is unconstitutional in derogation of the Sixth, First and Fourteenth Amendments.

TABLE OF CONTENTS

Page

Questions Presented..... i

Table of Authorities..... iii

Opinions Below..... 1

Jurisdiction..... 2

Statute Involved..... 2

Constitutional Provisions Involved..... 2

Statement of the Case..... 3

Reasons for Granting the Writ..... 4

I: The questions presented in the context of the Sixth Amendment are substantial, as evidenced by the noting of probable jurisdiction in Globe Newspaper Co. v. Superior Court, Docket number 81-611, (November 16, 1981), which will address similar questions within the parameters of the First Amendment..... 4

II: There appears to be a significant diversity of opinion on the questions presented in both the federal and state courts..... 8

Conclusion..... 11

Appendix - Table of Contents..... 11

TABLE OF AUTHORITIES

Cases:	Page
Aaron v. Capps, 507 F2d 684 (5th Cir. 1975)	8
Davis v. United States, 247 Fed. 394 (8th Cir. 1917)	8
Duncan v. Louisiana, 391 U.S. 145 (1968)	5
Estes v. Texas, 381 U.S. 532 (1965) 68	6n
Gannett Co. v. DePasquale, 443 U.S. 368 (1979)	7n
Globe Newspaper Co. v. Superior Court, 401 NE2d 360 (1980). judg. vacated 449 U.S. 894 (1980), on remand 423 NE2d 772 (1981), cert granted ___U.S.___, docket numbers 81-611 (November 16, 1981)	4,4n,7,7n,8
Harris v. Stephans, 361 F2d 888 (8th Cir. 1966) cert. denied 386 U.S. 964 (1967)	8
In re Oliver, 333 U.S. 257 (1948)	5
People v. Hartman, 103 Cal. 242 (1894)	9
People v. Jelke, 308 N.Y. 56 (1954)	6n,9
People v. Kerrigan, 73 Cal. 222 (1887)	9
People v. March, 419 NE2d 1212 (Ill. App. 1981)	5
People v. Yeager, 113 Mich. 228 (1897)	8n,9
Rhodes v. State, 102 Neb. 750 (1918)	8
Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980)	5,7,7n,10
State v. Callahan, 100 Minn. 63 (1907)	9
State v. Croak, 167 La. 92 (1928)	9
State v. Hensley, 75 Ohio St. 255 (1906)	8
State v. Nyhus, 19 N.D. 326 (1909)	9
State v. Osborne, 54 Ore. 289 (1909)	8
State v. Schmit, 139 NW2d 800 (Minn. 1966)	6,7,8
Tanksley v. United States, 145 F2d 58 (9th Cir. 1944)	6,6n,8,10
United States v. Eisner, 533 F2d 987 (6th Cir. 1976), cert denied 429 U.S. 919 (1976)	10
United States v. Kolbi, 172 F2d 919 (3rd Cir. 1948)	6n,7,8
United States ex rel. Bennett v. Rundle, 419 F2d 599 (3rd Cir. 1969)	8
United States ex rel. Latimore, Sielaff, 561 F2d 691 (7th Cir. 1977)	8,10
United States ex rel. Lloyd v. Vincent, 520 F2d 1272 (2nd Cir. 1975), cert. denied 423 U.S. 937 (1975)	10

Constitutional and Statutory Provisions: Page

Michigan Act No. 408, Local Arts of 1893 §18..... 8n

Massachusetts General Laws c. 278 §16A..... 4n

New York Judiciary Law §4..... 2,5,9

United States Constitution

First Amendment..... 2,4,4,7,8,9

Sixth Amendment..... 2,5 et seq.

Fourteenth Amendment..... 3,5,9,10

28 U.S.C. §1257(3)..... 2

28 U.S.C. §2403(b)..... 2

Other Authorities:

Annotation, Validity and Construction of Constitution or Statute Authorizing Exclusion of Public In Sex Offense Cases, 39 ALR 3d 852..... 6

Cooley, Constitutional Limitations (7th ed. 1903)..... 6n

Note, The Accused's Right to a Public Trial, 42 Notre Dame Law. 499 (1967)..... 8n

Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L.Rev. 1139 (1966)..... 8n

6 J. Wigmore, Evidence §1834 (J. Chadbourn rev. 1976)..... 6n,7n

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Division, Supreme Court of New York, Fourth Judicial Department, affirming petitioner's conviction for Rape, First Degree and Robbery, Second Degree.

OPINIONS BELOW

The order and majority memorandum opinion of the Appellate Division are contained in the Appendix at A-2 and A-3. The dissenting opinion is contained in the Appendix from A-4 thru A-9. The decision is published at 444 N.Y.S.2d 333, ___A.D.2d___ (11/13/81). By order of the Honorable Domenick L. Gabrielli, Associate Judge of the New York State Court of Appeals, the petitioner was denied leave to appeal to this state's highest court. (Appendix, A-1).

JURISDICTION

The judgment of conviction became final in all respects when the Court of Appeals denied petitioner's application for leave to appeal from the order of the Appellate Division, Fourth Department, which affirmed the conviction of the New York State Supreme Court, Monroe County. The order of the Court of Appeals was entered on January 7, 1982. Since the constitutionality of a statute of the State of New York has been drawn in question, 28 U.S.C. §2403(b) may be applicable and a copy of this petition for certiorari, as well as the motion to proceed in forma pauperis and its supporting affidavit, has been served on the Attorney General for the State of New York. This Court's jurisdiction in invoked under 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

The text of Judiciary Law §4 is as follows:

"The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV §1

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted after a bench trial of rape, first degree and robbery, second degree on December 3, 1976.

The primary witness against the petitioner was the complainant, Miranda Haley. Prior to her testimony the prosecutor asked the Court to exclude the spectators from the courtroom in view of the fact that Ms. Haley was the victim in a rape case. (Appendix, A-10) Defense counsel objected to the application for closure (Appendix, A-10 and A-11). The trial court ruled that the public, except for the press, would be excluded from the courtroom during Ms. Haley's testimony. Included in the court's order of exclusion was the petitioner's mother. (Appendix, A-12)

Ms. Haley testified that on March 20, 1975, a man she identified as the petitioner knocked on the door of the group home, where she worked as a resident counselor, asking to use the telephone. Ms. Haley allowed the man in and after using the phone, he refused to leave. Instead, he threw Ms. Haley down the basement stairs, causing "a little bit of a cut" and soreness, which lasted about a week. The man asked her for some money, and she led him to a desk from which he took about $20.00. Ms. Haley testified that she was then taken upstairs to the bedroom of one of the residents of the group home where she engaged in sexual intercourse out of fear that resistance would result in her injury. She testified that the act of intercourse lasted for only thirty seconds and that the man did not ejaculate. After her testimony, the courtroom was open to the public and twelve other witnesses were called by the prosecution.

The defendant presented an alibi defense in an effort to establish that he was with his father on his way to work at the time this incident was alleged to have occurred.

The trial court found the defendant guilty of rape, first degree; robbery, second degree; assault, second degree; and petit larceny. The Court, sua sponte, dismissed the assault and larceny counts as lesser included offenses.

The Court later sentenced the petitioner on the rape conviction to an indeterminate term of imprisonment having a minimum of eight and one-third years and a maximum of twenty five years. The Court imposed a lesser sentence on the robbery count to run concurrently with the sentence for the rape conviction. These sentences were ordered to run consecutively to a previously imposed sentence of five to fifteen years.

REASONS FOR GRANTING THE WRIT

I: The questions presented in the context of the Sixth Amendment are substantial, as evidenced by the noting of probable jurisdiction in Globe Newspaper Co. v. Superior Court, Docket number 81-611, (November 16, 1981), which will address similar questions within the parameters of the First Amendment.

II: There appears to be a significant diversity of opinion on the questions presented in both the federal and state courts.

I.

This Court has recently noted probable jurisdiction in the case of Globe Newspaper Co. v. Superior Court, docket number 81-611, cert. granted November 16, 1981. A reading of the lower court opinions[1] in that case indicate that the constitutionality of a Massachusetts statute (Mass. G.L. c. 278, §16 A)[2] is being

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[1] 401 NE2d 360 (1980); on remand 423 N.E.2d 772 (1981)

[2] General Laws c. 279 §16 A reads: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under 18 years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case."

challenged on First Amendment grounds because the statute requires the closure of a court in certain specified cases during the testimony of a complainant who is a minor. Petitioner contends that the New York Statute (§4 Judiciary Law) which gives the trial court unfettered discretion to close the courtroom for the trial of a rape case, for no other reason than the fact it is a rape case, is equally offensive to the Consititution.

In the case at bar, the courtroom was closed over the objection of the petitioner which brings this case within the protection of the Sixth and Fourteenth Amendments of the United States Constitution.

The Supreme Court has already stated that the public trial protection of the Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment (In re Oliver, 333 U.S. 257 (1948); Duncan v. Louisiana, 391 U.S. 145, 148 (1968)).

In Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), this Court dealt with the right of the press under the First Amendment to a public trial when closure was ordered on request of the defendant with the acquessence of the prosecutor. The Court held that where the closure involved a criminal trial, the exclusion of the press violated the First and Fourteenth Amendment where "the trial judge made no findings to support closure"; failed to inquire into "alternative solutions" which would have "ensured fairness"; and, failed to "recognize any right under the Constitution for the public or press to attend the trial." (Richmond Newspapers, Inc. v. Virginia, supra, p. 580-581). Petitioner contends that an accused is entitled to at least the same protection under the Sixth Amendment as the press is under the First Amendment. Specifically, "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public" (Richmond Newspapers Inc. v. Virginia, supra., at 581; Also see, People v. March, 419 NE2d 1212, 1216 (Ill, App. 1981)). Consequently, a statute which permits closed criminal trial proceedings without a factual determination necessitating closure, violates the Sixth and Fourteenth Amendments to the Constitution.

The circumstances which resulted in the closure of petitoner's trial are strickingly similar to those which existed in Tanksley v. United States, 145 F2d 58 (9th Cir. 1944) and State v. Schmit, 139 NW2d 800 (Minn. 1966). In both of those cases the order of closure was held to have violated the defendant's right to a public trial. However, petitioner's conviction has been affirmed by a divided appellate court. It is extremely important to note that the petitioner's mother was excluded from the courtroom during the testimony of the complainant (Appendix, A-12).[3] Various courts have held, despite the existence of a statute or state constitutional provision, that the exclusion of a defendant's family, relatives and close friends violates the constitutional protection of the right to a public trial (See, 39 ALR3d 853, Validity and Construction of Constitution or Statute Authorizing Exclusion of Public in Sex Offense Cases, §6 and cases cited therein). Petitioner is unaware of any case where a trial court's exclusion of a family member was upheld after appellate review.

Clearly, the Sixth Amendment right to a public trial is designed to protect certain fundemental rights of an accused separate and apart from the rights of the press which are protected by the First Amendment. The protections or safeguards of the Sixth Amendment are: to assure the accused a fair trial "that the public may see he is fairly dealt with and not justly condemned",[4] to aid in assuring trustworthy testimony,[5] and, keep open the possibility that a witness unknown to either party may attend the public trial.[6]

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[3] The record is unclear as to whether the defendant's father was also excluded. However, since it is arguable that he could be properly excluded since he was subsequently a witness on petitioner's behalf, it is submitted that his absence or presence is not as critical to this precise issue on which petition for certiorari is based.

[4] United States v. Kolbi, 172 F2d 919, 921 (3rd Cir. 1948); Estes v. Texas, 381 U.S. 532, 538-539 (1965); Also see, Cooley, Constitutional Limitations 441 (7th ed. 1903).

[5] People v. Jelke, 308 N.Y. 56, 62 (1954); Also see, 6 Wigmore, Evidence §1834 (J. Chadbourn rev. 1976).

[6] See, Tanksley v. United States, 145 F2d 48, 59 (9th Cir. 1944).

It should be noted that in the case at bar, the trial court allowed members of the Gannett Press to be present during the complainant's testimony. Therefore, the precise issue before the Court in Globe Newspaper Co. is not duplicated in this case.[7] The presence of the press does not mean that a defendant's trial is public since courts have held that allowing the press to attend a criminal trial is not sufficient to protect the Sixth Amendment rights of the accused. (State v. Schmit, 139 NW2d 800, 806 (Minn. 1966); United States v. Kolbi, 172 F2d 919, 923 (3rd Cir. 1948)). It would also appear that if the court was ordering the courtroom closed to save the witness any embarrassment, the Court's order was anomalous. Certainly one group of strangers to whom a person would be reluctant to divulge personal and embarrassing information would be the press.

This Court has recently ruled on the right of the press under the First Amendment to compel attendance at pretrial hearings[8] and trials.[9] In view of the determination of probable jurisdiction in Globe Newspaper Co. v. Superior Court, supra, the Court now appears ready to assess the right of the press under the First Amendment to challenge the temporary closure of a trial, a question specifically left open in the Richmond News case.[10] Thus, the Court will have an opportunity to rule of the propriety of limited closures in certain types of cases in relation to the rights of the press under the First Amendment. However, a major issue still remains unresolved

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[7] In Globe Newspaper Co., the only issue before the Court is the right of the press under the First and Fourteenth Amendments. [See, Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 775-776 (1981)]

[8] Gannett Co. v. DePasquale, 443 U.S. 368 (1979)

[9] Richmond Newspapers Inc. v. Virginia, supra.

[10] In Richmond Newspapers Inc. v. Virginia, supra, at pp. 581-582 Fn 18 the Court stated, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., e.g., 6 J. Wigmore, Evidence §1834 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. ..., so may a trial judge, in the interest of the fair administration of justice impose reasonable limitations on access to a trial. ...

regarding the defendant's right to a public trial under the Sixth Amendment when he objects to a limited closure which was ordered in reliance upon a state statute without a factual hearing or any showing of necessity.

The First Amendment issue which is presently before this Court in the Globe Newspaper Co. case is squarely presented in a Sixth Amendment context by the facts of this case.

II.

There appears to be widespread diversity among the federal circuit courts with regard to the temporary closure of trials in certain types of cases. Certain courts have ruled closures impermissible (Tanksley v. United States, 145 F2d 58 (9th Cir. 1944); United States v. Kolbi, 172 F2d 919 (3rd Cir. 1948); Davis v. United States, 247 Fed. 394 (8th Cir. 1917); also see, United States ex rel. Bennett v. Rundle, 419 F2d 599 (3rd Cir. 1969)), while other courts have held certain types of closures permissible (United States ex rel. Latimore v. Sielaff, 561 F2d 691 (7th Cir. 1977); Harris v. Stephens, 361 F2d 888 (8th Cir. 1966) cert. denied 386 U.S. 964 (1967); Aaron v. Capps, 507 F2d 684 (5th Cir. 1975)).[11] The state courts are also in disagreement over the issue of the temporary closure of a criminal trial. Some state courts have found the order of closure improper in the context of the case on appeal (State v. Schmit, supra.; State v. Osborne, 54 Ore. 289 (1909); Rhodes v. State, 102 Neb. 750 (1918); State v. Hensley, 75 Ohio St. 255 (1906)), while one state has gone so far as to declare their statute which provided for closed criminal trials in certain types of cases unconstitutional[12]

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[11] See generally, Note, The Accused's Right to a Public Trial, 42 Notre Dame Law. 499, 499-501 (1967); Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L.Rev. 1139 (1966).

[12] Act No. 408, Local Acts 1893, §18 which provided,

"Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire and absent himself or herself from the courtroom during such trial or any portion thereof." (See, People v. Yeager, supra., at p. 229)

(People v. Yeager, 113 Mich. 229 (1897)). Other state court decisions have upheld the temporary closure of a criminal trial over the defendant's objection (People v. Kerrigan, 73 Cal. 222 (1887), but see, People v. Hartman, 103 Cal. 242 (1894); State v. Croak, 167 La. 92 (1928); State v. Callahan, 100 Minn. 63 (1907); State v. Nyhus, 19 N.D. 326 (1909)).

Interestingly, despite the significance of the holding in People v. Jelke, 308 N.Y. 56 (1954), the New York State Court of Appeals has never ruled on the constitutionality of section 4 of the Judiciary Law. In Jelke, the court stated, "concerned as we here are only with cases not encompassed by the special provisions of section 4 of the Judiciary Law, we need not now consider the scope or extent of the rights of a defendant standing trial in one of the cases listed in that statute." (People v. Jelke, supra. at p. 68; emphasis supplied).

Petitioner asserts that the unfettered discretion given a court to order closure because the charge is rape, for example, violates the defendant's right to a public trial as guaranteed by the Sixth, Fourteenth and First Amendments to our Constitution. Here the record clearly demonstrates that the order for closure was based totally on the discretion permitted by §4 of the Judiciary Law. The record contains no assertion or evidence demonstrating the inability of the complainant to testify because of fear or embarrassment. Nor was the decision of the lower court based on such a finding. In fact, the record clearly establishes that the determination of the lower court was based solely on the discretion afforded the court by section 4 of the Judiciary Law. As the dissenting opinion at the Appellate Division stated,

> The testimony of the complainant in the instant case, however, does not reveal the need for closure. She was a 29 year old married woman of average intelligence who related the incident without apparent difficulty. Nor were the facts of such lurid character as to warrant protection of the witness from emotional trauma or of the public from salacious testimony (see People v. Jelke, supra). That is not to say that

> the complainant was not embarrassed or reluctant to recount openly the facts pertaining to the charge. That, however, is true in most rape cases and is not a sufficiently compelling reason to support a suspension of a constitutional right over defendant's objection (see Tanksley v. United States, 145 F2d 58; cf. United States ex rel. Latimore, 561 F2d 691, supra). [Hon. M. Dolores Denman, Appendix A-8]

The unlimited discretion provided by the New York Statute to authorize the closure of a criminal trial without any type of hearing or determination that closure is necessary, violates our constitutional public trial protection. A number of courts, including the Supreme Court, have suggested that hearings be conducted to insure that a closure is necessary. (See, Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580-581 (1980); United States ex rel. Lloyd v. Vincent, 520 F2d 1272, 1275 (2nd Cir. 1975), cert. denied 423 U.S. 937 (1975); United States v. Eisner, 533 F2d 987, 994 (6th Cir. 1976), cert. denied 429 U.S. 919 (1976); United States ex rel. Latimore v. Sielaff, supra, at p. 696).

As suggested by the dissenting opinion below, if the decision of the majority is permitted to stand, "closure would be permissible in any case enumerated in section 4 of the Judiciary Law,...., without requiring the court to articulate the reasons for such action. The mere fact that the case involves a charge of rape, for instance, would trigger the exercise of the court's discretion to exclude the public. Thus, closure, not public trial, would be the norm in such cases." (Appendix, A-7).

Petitioner respectfully submits that the New York Statute as written and applied to his case violates his right to a public trial as guaranteed by the Sixth and Fourteenth Amendments to our Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Date	Page
Order Denying Application for Leave to Appeal to the Court of Appeals	1/7/82	A-1
Order of Appellate Division Affirming Petitioner's Judgment of Conviction	11/13/81	A-2
Majority Opinion of the Appellate Division	11/13/81	A-3
Dissenting Opinion of the Appellate Division	11/13/81	A-4
Portion of Trial Transcript Regarding The Issue of Closure	11/17/76	A-10
Portion of Trial Transcript Indicating Closure of The Court	11/17/76	A-12